No. 85-781

In the Supreme Court of the United States

OCTOBER TERM, 1986

FRANK G. BURKE, ACTING ARCHIVIST OF THE UNITED STATES AND RONALD GEISLER, EXECUTIVE CLERK OF THE WHITE HOUSE, PETITIONERS

v.

MICHAEL D. BARNES, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

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Respondents – the United States Senate and Members of the House of Representatives – seek a judicial declaration that H.R. 4042 became a law under Art. I, § 7, Cl. 2 of the Constitution when the President did not return it to the House of Representatives within ten days (Sundays excepted) of its presentment to him. However, before that ten-day period expired (and in fact on the very day the bill was presented to the President), Congress adjourned the First Session of the 98th Congress sine die, thereby preventing the President from returning the bill to the House of Representatives for reconsideration. To assure that a bill will not remain in limbo in those circumstances if the President does not sign it, the Constitution terminates the legislative process with respect to the bill by specifying that "it shall not be a Law." The Court unanimously so held in *The Pocket Veto Case*, 279 U.S. 655 (1929), drawing support for its holding from the unbroken practice under the Constitution since the Administration of James Madison.

Respondents point to no new evidence suggesting that this Court in *The Pocket Veto Case* and the 25 Presidents who

treated such bills as having failed of enactment erred in their understanding of the clear rule prescribed by the Framers to govern the situation in which Congress has adjourned prior to completion of the time allotted for the legislative process. Respondents' argument instead derives almost entirely from *Wright* v. *United States*, 302 U.S. 583 (1938). But *Wright* involved wholly different circumstances—an actual return of the bill by the President during a brief three-day recess by only one House—and the Court in *Wright* in fact unanimously declined to disturb the holding of *The Pocket Veto Case*. The Court should again decline to do so here.

The reasons for rejecting respondents' invitation go beyond these considerations on the merits. Respondents urge this Court to overrule *The Pocket Veto Case* in the context of an abstract disagreement over the meaning of a constitutional provision, with nothing concrete turning on the outcome: respondents lack standing to obtain such a declaration because they do not claim that they would have any rights under H.R. 4042 if it did become a law, and the controversy regarding the status of H.R. 4042 is now moot in any event because the bill's expiration date has passed. Respondents strain to overcome both mootness and their lack of standing by arguing that their votes and roles in the legislative process have been "nullified" by the failure of the Archivist at least to receive the bill from the President and to publish it as a law. This argument is without merit. The question whether H.R. 4042 became a law is answered by the Constitution itself, and the operative constitutional rule is unaffected by whether or not the bill has been received and published by the Archivist. For this reason, petitioners could not have "nullified" respondents' votes and legislative roles—and therefore could not have been the cause of the amorphous injury respondents allege—even if H.R. 4042 did become a law. Furthermore, as representatives of the Legislative Branch, respondents have no standing to sue an Executive Branch official to resolve a dispute regarding the latter's execution of the law, including the bill-publication statute.

Especially with no legal rights at stake and no statutory basis for the suit, the Court should reject this effort by representatives of the Legislative Branch to obtain from the Judiciary

what would amount to nothing more than an advisory opinion regarding the application of the lawmaking procedures in Article I, Section 7. We shall first address these interrelated questions of standing and mootness.

A.

Respondents cite no decision of this Court in the nearly 200 years since the institution of the Government under the Constitution that sanctions a suit such as this—a suit brought by Members and one House of the Legislative Branch against an officer of the Executive Branch to resolve a legal disagreement concerning the Executive officer's performance of his official responsibilities. Respondents apparently recognize the implications of their position, because they make little effort to defend the notion that individual Members of Congress have standing, except perhaps in narrow circumstances (H.R. Br. 15-19, 20-21, 25; Sen.-Barnes Br. 21-22 & n.13; see Gov't Br. 22, 24), or that representatives of the Legislative Branch have standing to sue an Executive official to challenge the manner in which he executes the law (H.R. Br. 23-26; Sen.-Barnes Br. 17-19). Respondents argue, however, that this case is different because what they challenge is petitioners' "nullification" of their votes in the legislative process. That argument fails, both on standing and mootness grounds.

1. Contrary to respondents' broad theme regarding the compatibility of congressional standing in this case with the doctrine of separation of powers (H.R. Br. 14-15, 25-26; Sen.-Barnes Br. 15-17), the Court's recent decision in *Bowsher* v. *Synar*, No. 85-1377 (July 7, 1986), confirms our submission (Gov't Br. 13-20) that recognition of a right in respondents to bring this action would conflict with the constitutional role of both the Judiciary and Congress under the Constitution.

a. It was established early in the Nation's history that the separation of powers under the Constitution and the nature of the "judicial Power" conferred by Article III do not contemplate that the Judiciary may be called upon to render an advisory opinion to one of the political Branches concerning its official duties, when no adverse parties are before the Court and no legal rights are to be vindicated. Correspondence of the

Justices, *reprinted in* 3 *Correspondence and Public Papers of John Jay* 486-489 (H. Johnston ed. 1891); *Muskrat* v. *United States,* 219 U.S. 346, 354 (1911). The Justices' declination of that request by the President, the wisdom of which has never been doubted, underscores the need to maintain the autonomy, sense of responsibility, and distinctive mode of decision-making of the respective Branches, as well as to avoid too close an association of the Court with the interests of another Branch.[1] These concerns are heightened where, as here, members of one of the political Branches request the Court to render an opinion regarding the actions of officials of the *other* political Branch, for then the Judiciary would be required to step between them to address what would almost inevitably partake of a dispute of the sort that the Constitution leaves for resolution by other means.[2]

The premise that such inter-Branch disputes not involving private parties are committed elsewhere for resolution is woven throughout the fabric of the Constitution. It is reflected first in the underlying principle that both the Members of Congress *and* the President are the elected representatives of the people in the operation of the Government. See *INS* v. *Chadha*, 462 U.S. 919, 948 (1983); *Synar,* slip op. 6; Art. I, §§ 2, 3; Art. II, § 1; Amend. XVII. The plan of the Framers to trust the internal operation of government to the sometimes imperfect process of interplay and compromise of these separate representative components (*Chadha,* 462 U.S. at 958-959) would be frustrated if the members of either could routinely submit their differences to arbitration by the unelected Third Branch. *Valley*

[1] Thus, the Court could not respond to a request from either the President or Congress (or a House or Members thereof) for an opinion as to whether H.R. 4042 became a law that must be implemented by the Executive. Nor could the Court do so if the President and Congress jointly requested such an opinion. The result should be no different in this case merely because respondents have made a unilateral request and put it in the *form* of a conventional lawsuit. However styled, this is not a "Case" or "Controversy" within the contemplation of the Constitution.

[2] For example, this suit was initiated by 33 Members of Congress who sought, on an expedited basis, to have the courts endorse their view that military aid to El Salvador must be terminated unless the President made a timely certification to Congress of progress on certain human rights matters – scarcely a familiar subject or context for judicial review.

Forge Christian College v. Americans United for Separation of Church & State, 454 U.S. 464, 473-474 (1982).

That this was not the intent also is demonstrated by the numerous provisions of the Constitution that provide for the political Branches to address each other *directly* in the governance of the Nation. Thus, the President is instructed to "give to the Congress Information of the State of the Union," and to "recommend to their Consideration such Measures as he shall judge necessary and expedient." Art. II, § 3. Correspondingly, when the two Houses of Congress pass a bill, it is "presented" to the President for review; if the President disapproves the bill, he must return it to the originating House "with his Objections," and those objections are to be entered on the Journal, reconsidered, and perhaps overridden by a two-thirds vote. Art. I, § 7, Cl. 2. The President also submits treaties and nominations to the Senate, seeking its "Advice and Consent." Art. II, § 2, cl. 2; see also Amend. XXV, § 2. And although Congress ordinarily is autonomous with respect to its meetings, the President may convene Congress or either of its Houses on "extraordinary Occasions" and adjourn them to an appropriate time when the two Houses are in disagreement. Art. II, § 3. Finally, the President and other civil officers are subject to impeachment by the House and conviction by the Senate, sitting as a court of impeachment, but only for "Treason, Bribery, or other high Crimes and Misdemeanors." Art. II, § 4; see also Amend. XXV, §§ 3, 4.

Notably absent from these prescribed means of official relation and communication between the political Branches is any mechanism for invoking judicial resolution of disputes. This structure strongly implies that disagreements that arise out of the formal intercourse between Congress and the Executive that is provided for in the Constitution – such as the dispute in this case arising out of the lawmaking procedures under Article I, Section 7 – were intended to be resolved by the on-going process of political interaction between them, except when the courts are required to resolve the issue in the course of deciding an ordinary case or controversy. Compare *Chadha,* 462 U.S. at 935-936; see also *Allen* v. *Wright,* 468 U.S. 737, 752 (citation omitted) (1984) ("federal courts may exercise power only 'in the

last resort, and as a necessity' "). Indeed, as we have pointed out in our opening brief (at 16 n.10, 19 n.13), the Constitutional Convention specifically rejected proposals to involve the Judiciary in the impeachment process and in a Council of Revision to review bills passed by Congress.[3] The text and background of the Constitution thus bespeak an intent to keep the Judiciary from playing an active role in the political interaction of the other two Branches of the Federal Government.

b. The considerations that render the Judicial Branch an inappropriate forum to entertain respondents' claims in this case are reinforced by corresponding limitations that are placed on the role of Congress under the Constitution and that withhold from it the power to invoke the Judiciary to resolve a disagreement with the Executive. The Court's observations in *Chadha*, recently reiterated in *Synar* (slip op. 10-11), are particularly pertinent here (462 U.S. at 954-955):

> Disagreement with the Attorney General's decision on Chadha's deportation * * * no less than Congress' original choice to delegate to the Attorney General the authority to make that decision, involves determinations of policy that Congress can implement in only one way; bicameral passage followed by presentment to the President.

Under *Chadha* and *Synar*, then, Congress's "disagreement" with

[3] Respondents argue that the rejection of the Council of Revision is irrelevant because the objection was to involving judges in considering the wisdom of legislation when they would also consider its constitutionality. See Sen.-Barnes Br. 26 n.17, quoting 1 M. Farrand, *The Records of the Federal Convention of 1787*, at 97-98 (1966). Respondents miss the point. Those considering the proposal contemplated that the judges would pass upon the constitutionality of the law in their traditional judicial role only later, "as it should come before them" (*id.* at 98; see also *id.* at 138; 2 *id.* at 75, 76, 78), and that "Judges ought never to give their opinion on a law till it comes before them" (*id.* at 80). It would be inconsistent with the judicial role the Framers envisaged to recognize in this case a right in Congress or its Houses or Members to obtain an immediate and admonitory opinion from the Judiciary regarding the efficacy of a bill presented to the President, rather than to postpone that question until an occasion might arise for the courts to perform their traditional and more detached role of expounding the law in a case involving private interests that are actually affected by the law.

the various Executive decisions with which respondents have taken issue—the President's decision not to regard H.R. 4042 as a law, the resulting administration of the appropriation statutes for El Salvador without application of the certification conditions in H.R. 4042, the President's (Executive Clerk's) failure to deliver the bill to the Archivist, and the latter's failure to publish it—can be "implement[ed] in only one way," through the enactment of a new law that prescribes Congress's substantive position. Because Congress may affect the "legal rights, duties, and relations of persons [outside the Legislative Branch], including * * * Executive Branch officials," only by making a law in the manner prescribed by Art. I, § 7 (*Chadha*, 462 U.S. at 952), it is only such legislative action that can accomplish respondents' stated purpose of affecting the duties of Executive officials responsible for bringing about the publication of bills. See also *Synar*, slip op. 18-24 (Stevens, J., concurring in the judgment). Congress—let alone its Houses and Members—cannot make "law" through litigation. Congress's lack of a judicially cognizable interest in the Executive's actions in these circumstances is further demonstrated by the Court's observation in *Synar* that "the President, under Article II, is responsible not to the Congress but to the people" (slip op. 6).

c. The foregoing discussion demonstrates why respondents' extensive reliance (H.R. Br. 8-14, 16; Sen.-Barnes Br. 7-9) on *Coleman* v. *Miller*, 307 U.S. 433 (1939), is misplaced. There, the Court, over the vigorous dissent of four Justices, held that it had jurisdiction to review the decision of a state court that had decided a federal constitutional question (the right of the Lieutenant Governor to break a tie in the state Senate in the vote to ratify the Child Labor Amendment) in an action brought by state legislators against state defendants. *Coleman* is different from this case in a number of critical respects. First, the Court did not hold that the state legislators could have sued directly in federal court, as respondents have done. See *id.* at 465 (Frankfurter, J., dissenting); Pet. App. 95a-99a (Bork, J., dissenting). Second, the Court in *Coleman* stressed that the legislators' interest was "treated by the state court as a basis for entertaining and deciding the federal questions" and therefore was "sufficient to give the Court jurisdiction to review that

decision" (307 U.S. at 446). Thus, the decision in *Coleman* rested on a determination by the state supreme court that *state* legislators had a sufficient interest in the effectiveness of their votes as a matter of *state* law to permit that interest to be cognizable in *state* court. The standing issue in this case is entirely different: it concerns the interests that are directly cognizable in *federal* court and depends upon the relation of the Branches of the *Federal* Government under the *Federal* Constitution. Compare *Reynolds* v. *Sims*, 377 U.S. 533, 572-575 (1964); *United States* v. *Gillock*, 445 U.S. 360, 370 (1980). Finally, the issue in *Coleman* concerned the effectiveness of the legislators' votes under the procedures utilized *within* the legislative branch. Cf. *Bender* v. *Williamsport Area School District*, No. 84-773 (Mar. 25, 1986), slip op. 10 n.7. In this case, by contrast, the individual respondents do not contend that their votes were not counted or were not given effect within the Legislative Branch.

2. Against this background, it is not surprising that respondents do not maintain that Congress and its Houses and Members have standing to sue Executive officials as a general matter, especially to resolve disputes over the execution of the laws. Instead, respondents posit what they attempt to portray as a narrower theory: that petitioners, by failing to bring about the publication of H.R. 4042, failed to regard H.R. 4042 as a law, which "nullified" respondents' votes and roles in the legislative process. H.R. Br. 14, 21-26; Sen.-Barnes Br. 6-9, 17-27. But this theory does not avoid the nonjusticiability that respondents essentially concede when Congress or its Members ask the courts to compel the Executive to execute the laws in a particular way.

When this suit initially was filed by the 33 respondent Members of Congress, they plainly sought to vindicate a substantive interest in having the President discontinue aid to El Salvador or follow the certification requirements in H.R. 4042. Consistent with this purpose, respondents sought expedited consideration of this case, so that a decision might be rendered prior to the next certification date of January 16, 1984. Respondents claimed that their votes were "nullified" by the President's failure to comply with the substantive requirements of H.R. 4042. See Gov't Br. 9 & nn. 4, 5.

Respondents apparently no longer rely directly on this theory.

See H.R. Br. 25; Sen.-Barnes Br. 19 n.11. And with good reason. Any supposed "impasse" (H.R. Br. 20; Sen.-Barnes Br. 21) regarding the status of the certification conditions clearly is now moot, because H.R. 4042 would have expired by its own terms more than two years ago even if it did become a law.[4] Moreover, insofar as respondents' argument once was based on an objection to the failure to implement H.R. 4042, respondents plainly *were* presenting a nonjusticiable claim concerning the execution of the law by the President and his subordinates in the Executive Branch.[5]

Respondents attempt to avoid an order vacating the judgment below on mootness grounds by arguing that they have a right to have this suit continue in order to cause petitioners to bring about the publication of H.R. 4042. However, respondents do

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[4] In arguing against mootness, respondents rely (Sen.-Barnes Br. 35-36) on several statutes that provide for the audit and reporting of expenditures. Respondents argue that whether or not H.R. 4042 became a law might have a bearing on whether covered expenditures were regarded as lawful by the Secretary of State or the Comptroller General and on whether either might make a report on that subject. However, none of these speculations could conceivably be a basis for regarding *this* case as a live controversy. Respondents point to no current dispute regarding such expenditures or reports. Moreover, neither the Secretary of State nor the Comptroller General is a party to this case, and neither petitioners nor respondents herein would be parties to any dispute regarding the legality of expenditures. Compare *Firefighters* v. *Stotts*, 467 U.S. 561, 569 (1984); *id.* at 585 n.1 (O'Connor, J. concurring); *id.* at 597-598 (Blackmun, J., dissenting); *Oil Workers Union* v. *Missouri*, 361 U.S. 363, 370-371 (1960). In any event, insofar as respondents object to the expenditure of funds, they necessarily raise a nonjusticiable disagreement with the Executive's administration of the law.

[5] If the President had concluded that H.R. 4042 became a law but declined to implement it because he concluded that it was *substantively* void under the Constitution, then there of course could be no question that this case would have concerned the execution of the law. The result is no different here merely because the Executive's position was that H.R. 4042 is *procedurally* void. Contrary to the contention by the Senate-Barnes respondents (Br. 19 n.11), it does not matter for these purposes that respondents did not actually name the President as a defendant and seek an injunction requiring him to comply with H.R. 4042. The declaratory judgment they sought was admittedly for the purpose of compelling adherence to the certification requirements in H.R. 4042. The justiciability defect in such a suit brought by Congress or its members cannot be circumvented by artful pleading. Cf. *Heckler* v. *Ringer*, 466 U.S. 602, 614-616 (1984).

not argue that they have standing to bring an action to compel publication for its own sake. To the contrary, respondents expressly state that they "do not assert that the preservation and publication statutes confer upon them a basis for standing that exists independently of their cognizable interest in vindicating their votes to enact H.R. 4042." Sen.-Barnes Br. 29; see also *id.* at 31. For the reasons stated in our opening brief (at 28-29 & n.23), it is indeed clear that respondents have no special right of action under the bill preservation and publication statutes. But it is equally clear that they cannot overcome that obstacle on the theory that the Archivist's failure to publish H.R. 4042—which occurred because the President did not regard H.R. 4042 as a law and cause it to be delivered to the Archivist—somehow "nullified" their votes and roles in the legislative process.

Respondents' argument rests in part on the erroneous premise that the failure of a bill under the last Clause of Art. I, § 7, Cl. 2 (the so-called Pocket Veto Clause) is something that the President *does* that affirmatively "nullifies" legislative action. This is inaccurate. A bill fails under that Clause automatically, as a result of the directive that the bill "shall not be a Law." On the other hand, if the Pocket Veto Clause is inapplicable, as respondents maintain, the bill automatically becomes a law by operation of the directive in the preceding Clause that the bill "shall be a Law" if it is not returned within the ten-day period. Thus, a determination or statement by the President or others in the Executive Branch that a bill has not become a law under the Pocket Veto Clause is simply the expression by them of an opinion regarding the operation of the constitutional mechanism; it is not a formal action of independent significance that could be said to "nullify" respondents' legislative roles or injure them in a judicially cognizable manner. Respondents' objection therefore must be that the President acted on his view of the Constitution and accordingly did not carry out the substantive provisions of H.R. 4042. But as we have explained above, any disagreement over the implementation of H.R. 4042 is one concerning the execution of the law, which respondents appear to concede is nonjusticiable in a suit brought by the Legislative Branch, and which is in any event now moot.

Moreover, whether H.R. 4042 was published has no bearing on whether it became a law. If respondents' view of the Pocket Veto Clause is correct, then H.R. 4042 became a law automatically, and publication can give it no added legal force.[6] The Archivist's failure to publish H.R. 4042 therefore in no way "nullified" respondents' votes or otherwise caused them injury even if they are correct that H.R. 4042 became a law. Indeed, respondents concede that they have no standing to bring an action to require publication for its own sake, and any such suit would be nonjusticiable when brought by the Legislative Branch because it would concern the execution of the law—in this case, the publication statutes.[7]

In sum, because publication has no bearing on respondents' underlying constitutional claim and would have no legal consequences, it is clear that respondents simply seek a judicial declaration that H.R. 4042 became a law—a declaration that would be rendered in a completely abstract setting, since H.R. 4042 has expired even if it did become a law.[8]

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[6] In *The Pocket Veto Case* and *Wright*, the nonpublication and publication of the respective bills in question were not treated by the Court as determinative of their legal effectiveness. Thus, contrary to respondents' suggestion (Sen.-Barnes Br. 31-32), the rights of a proper litigant to claim the legal benefit of a law cannot be defeated by nonpublication.

[7] Nor have respondents shown even as a statutory matter that the publication statutes, which impose duties on the Archivist only with respect to bills that have become laws and that have been received by him (see Gov't Br. 29-30 & n.23), were intended to furnish a vehicle for the litigation of a question that can arise only *before* the Archivist has obtained custody: whether the bill has become a law that in turn must be delivered *to* the Archivist. It is most improbable that Congress would have intended to create a private right of action to litigate that antecedent and fundamental constitutional question in so ministerial a context as the statutory framework for publication of a law, since publication does not affect legal rights in any concrete way.

[8] Petitioners' failure to urge their objection to the Senate's standing prior to the issuance of the court of appeals panel opinion does not foreclose this Court's consideration of the issue of respondents' standing. See *Bender*, slip op. 6-7. Of course, both the panel and the district court were bound by the law of the circuit with respect to standing. See *Kennedy* v. *Sampson*, 511 F.2d 430 (D.C. Cir. 1974). In light of Judge Bork's dissenting opinion and upon further reflection, petitioners no longer adhere to the view expressed in oral argument before the court of appeals that the Senate has standing in this case.

B.

If the Court does not dispose of this case on the standing and mootness grounds discussed in Point A, the judgment of the court of appeals should be reversed on the merits. On the very day that Congress presented H.R. 4042 to the President, it adjourned the First Session of the 98th Congress sine die. The Second Session of the Congress did not commence until more than nine weeks later. The Constitutional Convention specifically foresaw and supplied a clear rule to govern such situations in which Congress might withdraw from the lawmaking process before the expiration of the time permitted the President to consider a bill. In order to prevent the bill from remaining in limbo, the last Clause of Art. I, § 7, Cl. 2 provides that if the President does not sign the bill and "the Congress by their Adjournment prevent its Return, * * * it shall not be a Law." H.R. 4042 failed of enactment by operation of this Clause. As we have explained in our opening Brief, this conclusion is compelled by the text of the Pocket Veto Clause and of Art. I, § 7, Cl. 2 as a whole, as well as by the background and purposes of these provisions and their consistent application throughout virtually the entire history of the Nation. There is no merit to respondents' submission that H.R. 4042 became a law, despite the President's failure to sign it and Congress's adjournment sine die, merely because the House of Representatives authorized its Clerk to receive messages from the President after adjournment.

1. Respondents' argument would do serious damage to one of the most essential purposes of Article I, Section 7—that of furnishing clear rules to govern the lawmaking process, so that Congress, the President, and the people may know the legal status of bills that are pending at various steps in the process. As this Court recently explained, Art. I, § 7, Cl. 2 prescribes "a step-by-step, deliberate and deliberative process" (*Chadha,* 462 U.S. at 959) that was "finely wrought and exhaustively considered" by the Framers (*id.* at 951). Thus, it requires that a bill pass both Houses and be presented to the President; affords the President a specified number of days within which to consider the bill; and mandates a detailed procedure to be followed by the originating House and then the other House in reconsidering a measure that has been returned by the President with his objections.

In our view, the Pocket Veto Clause also furnishes a clear rule, under which the status of a bill in the circumstances to which it is addressed depends upon a public and formal action by one of the two Branches—either approval by the President, in which event the bill is a law, or (if the President does not sign the bill) the formal, bicameral act of adjournment by the Legislature, in which event "it shall not be a Law." Respondents argue, by contrast, that the Pocket Veto Clause, unlike all of the preceding clauses in Art. I, § 7, Cl. 2, does *not* prescribe a clear rule. As respondents candidly concede, their position is that the Clause "is not one of those constitutional provisions whose application is fixed" (Sen.-Barnes Br. 62), but instead that it states an "open-ended test" (H.R. Br. 46) that turns on "whether the potential dangers of uncertainty and delay" to which the Clause is directed are " 'real' or 'illusory' " at a particular time or in a particular context (Sen.-Barnes Br. 47-48). Such an approach would be antithetical to the obvious intent of the Framers to adopt "[e]xplicit and unambiguous provisions" (*Chadha*, 462 U.S. at 945) to govern the interaction of the political Branches under the structure of the Constitution. Compare *Synar,* slip op. 14; *Buckley* v. *Valeo,* 424 U.S. 1, 124-127 (1976). As one commentator has observed, with respect to constitutional provisions such as the Pocket Veto Clause that pertain to the operation of the Government (as distinguished from the more general constitutional clauses addressing individual rights), the Framers "clearly had in mind some specific institutional design, and the interpretive task is simply to discover what is was that they meant." Carter, *Constitutional Adjudication and the Indeterminate Text: A Preliminary Defense of an Imperfect Muddle*, 94 Yale L. J. 821, 854 (1985). Respondents point to no evidence whatever that the vague and changeable test they advance is what the Framers meant.

2. Respondents' argument also would effectively read the Pocket Veto Clause out of the Constitution.[9] In respondents'

[9] The Senate-Barnes respondents concede (Br. 40 & n.29) that the Pocket Veto Clause is applicable when "the Congress has terminated"—which, they assert, "occur[s] every two years at the end of a Congress," when there is a " '[f]inal' adjournment[ ]." As the House respondents note (H.R. Br. 47 n.54), however, the termination of congressional business at the end of Congress's biennial term results from internal rules of each House which have been

view, there are only two purposes served by the lawmaking provisions at issue here: assuring the President an adequate time to consider a bill presented to him, and assuring Congress the opportunity to repass the bill over the President's objections if he does not approve it. From this premise, respondents argue that the delivery of a bill to a congressional agent is sufficient to effect an actual return of the bill to the originating House itself, because it permits the President ten days within which to review the bill, and allows Congress an opportunity to repass the bill over his objections whenever it later reconvenes and receives the bill and the President's message from its agent. This submission treats the question of whether the return of a bill has been "prevent[ed]" by an adjournment as if the Constitutional Convention were concerned with nothing more than mechanics and the possible existence of an impediment to the actual physical delivery of a piece of paper to someone in the Capitol Building. "[T]he drafters had a less frivolous purpose in mind" (*Buckley* v. *Valeo*, 424 U.S. at 125).[10]

altered in the past. In any event, as we have pointed out in our opening brief (at 40-41 & n.29), there is no textual support for the notion that so-called "final" adjournments are unique in any respect that bears on the application of the Pocket Veto Clause, and this Court specifically rejected such a claim in *The Pocket Veto Case*. 279 U.S. at 680, Moreover, a construction limiting application of the Clause to so-called "final" adjournments would be unworkable because, as President Roosevelt explained to the Third Session of the 76th Congress, "it is impossible to determine at the time of the adjournment of the second regular session of a Congress whether or not it is the final adjournment of the Congress." 86 Cong. Rec. 9888 (1940). Even after what is thought to be a final session of a Congress, it can be reconvened by the President. Moreover, under modern practice, when Congress adjourns sine die, the House and Senate often authorize the Speaker and Majority Leader to reconvene the House and Senate if the public interest warrants. Pet. App. 5a n.7.

[10] Respondents argue (H.R. Br. 28) that the "focal consideration" of the Pocket Veto Clause "is prevention of return, not adjournment," and that if the Framers had intended for the pocket veto to be applicable whenever Congress has adjourned, there would have been no need for them to speak of "prevent[ing]" return. This argument is misplaced. If the Framers had been concerned only with whether the physical delivery of a veto message was im practicable, any reference to adjournment would have been superfluous. The very language of the Pocket Veto Clause thus indicates that the Framers conceived of adjournment by Congress—especially, as here, an adjournment sine die—as an event that peculiarly prevents the return of a bill. See *Wright*, 302 U.S. at 608-609 (Stone, J., concurring in the result) ("The very force of the

As this Court made clear in *The Pocket Veto Case*, the provisions for return of a bill both reflect and serve another essential purpose in the lawmaking process. The Court held in that case that "under the constitutional mandate * * * no return can be made to the House when it is not in session as a collective body," because "it was plainly the object of the constitutional provision that * * * return of the bill * * * should enable Congress to proceed *immediately* with its reconsideration." 279 U.S. at 683, 684-685 (emphasis added). Thus, within the meaning of the Pocket Veto Clause, the return of a bill is "prevented" by an adjournment, even if the bill might be physically delivered to an agent of the absent House, because "[t]he House, not having been in session when the bill was delivered to the officer or agent, could neither have received the bill and objections at the time, nor have entered the objections upon its journal, nor have proceeded to reconsider the bill, as the Constitution requires." *Id.* at 684.[11] Respondents' interpretation accords no significance to this central purpose of facilitating expeditious reconsideration.

Moreover, the Court in *The Pocket Veto Case*, in an extensive discussion, explicitly rejected the argument that delivery of a bill to an agent of the originating House following an adjournment sine die could effect a "return" of the bill within the meaning of the Art. I, § 7, Cl. 2. The Court found that notion to be in conflict with the text, purposes, and consistent application of the

circumstances to which the words are applied gives emphasis to 'Adjournment' as that which prevents return, and to 'their' as referring to the action of those members of Congress which effects the adjournment.").

[11] Respondents' own description of what happens to a bill that is delivered to a congressional agent after adjournment illustrates how the return contemplated by the Constitution is "prevented" (Sen.-Barnes Br. 62):

> In each instance, on the first day the originating House was in session, the agent formally transmitted the sealed envelope, which the President had stated contained the vetoed bill together with his objections, to the presiding officer. The date and time of receipt were noted both in the letter of transmittal and in the Congressional Record. The presiding officer announced in the chamber the receipt of the veto message in order for it to be read and to be spread upon the journal.

Under such a procedure, a bill simply is not "returned" to the originating House on the tenth day following its presentment. It is returned on the day that Congress reconvenes—a procedure that the Framers deliberately rejected. See page 17, *infra*.

Clause. 279 U.S. at 680-687. Respondents attempt to dismiss this discussion as mere dicta, relying on the Court's statement that neither House had actually adopted a rule authorizing an agent to receive such a delivery. See H.R. Br. 30; Sen.-Barnes Br. 45. However, that observation was but one phrase in a single sentence of the Court's seven-page discussion of the issue of effecting a return by delivery to an agent. See 279 U.S. at 684. The central thesis of that discussion was that delivery to an agent, with the actual submission of the bill and the President's objections to the originating House only at a later date, when it returned from its period of adjournment, would *not* comply with the constitutional requirement, but would instead "prevent" an effective return of the bill within the meaning of the Pocket Veto Clause. In light of that holding, the Court regarded the presence or absence of the sort of rule upon which respondents now rely as constitutionally *irrelevant*, and its passing reference to the absence of such a rule simply reflected that assessment. It would turn the constitutional holding of *The Pocket Veto Case* on its head to regard the Court's entire reasoning as mere dicta, as respondents propose.[12]

The concern for delay that may be occasioned by reliance on an agent has particular force in this case, in light of the nine-week delay until H.R. 4042 would have been submitted to the House at the start of the Second Session of the 98th Congress. Contrary to respondents' argument (Sen.-Barnes Br. 53-56), it does not matter that the originating House might not always schedule an immediate vote on the actual override of the President's veto, and instead might refer the bill to committee or dispose of it in some other manner. Even in that situation, the bill would have been formally returned to and be within the

[12] The Court clearly held that it was the timing of the adjournment sine die that was dispositive and caused the bill not to become a law: the bill failed because "[it was] presented to the President less than ten days (Sundays excepted) before the adjournment of that session, [and was] neither signed by the President nor returned by him to the House in which it originated" (279 U.S. at 672; see also *id.* at 691-692). The same sequence of events took place in this case, and the consequence under the unambiguous language of both the Pocket Veto Clause and *The Pocket Veto Case* is that H.R. 4042 "shall not be a Law." The operative effect that the Clause gives to the adjournment at the moment it occurs is unaffected by whatever arrangements one House might have made for an agent to receive a message from the President *after* the adjournment.

official cognizance of one of the political Branches, and thereby be capable of being acted upon, rather than being in limbo between the two Branches. As a result, the originating House is directly responsible to the people for whatever action it takes or fails to take. And, as noted in our opening brief (at 38 n.27), Congress traditionally has viewed itself as under a duty to give expeditious consideration to bills returned by the President.

3. The proceedings of the Constitutional Convention strongly support this interpretation of the Clause. As we have explained in our opening brief (at 36), the Committee of Detail at the Constitutional Convention considered but rejected a plan, patterned after the New York Constitution of 1777, that was indistinguishable in its practical operation from what respondents urge: the proposal stated that if the Legislature, by their adjournment, prevent the return of a bill, "it Shall be returned on the first Day of the next Meeting of the Legislature." 2 Farrand, *supra*, at 162. However, the Clause adopted by the Convention provides instead that such a bill "shall not be a Law." The Framers evidently anticipated the difficulties that could arise if a bill were kept in a state of suspended animation until the Legislature next met.

Respondents attempt to downplay the significance of this deliberate choice by speculating that the Committee of Detail and the Convention might not have given the wording of the Clause much thought. See Sen.-Barnes Br. 52-53 n.46; see also H.R. Br. 46 n.53. Such a notion of course is inconsistent with this Court's conclusion in *Chadha* that the lawmaking procedures in Art. I, § 7 were "finely wrought and exhaustively considered" (462 U.S. at 951), and with the fact that the alternative rejected by the Committee was already embodied in the Constitution of a major State. Respondents also suggest (Sen.-Barnes Br. 53 n.46) that the Framers might have rejected the proposal because they expected that periods of adjournment would be of extended length and did not anticipate that legislative business would carry over from one meeting to the next. However, as we have explained in our opening brief (at 49-50 & n.36), there is no reason to believe that the Framers had any fixed conception of the length of the sessions of Congress, and in fact the Continental Congress had been in almost con-

tinuous session between 1775 and 1784. But however that may be, the important consideration for present purposes is that the Framers deliberately chose *not* to adopt the approach respondents urge.

4. Respondents' repeated rhetoric (H.R. Br. 26, 30, 32, 34, 35, 39, 41, 42; Sen.-Barnes Br. 37, 38, 42) that the application of the Pocket Veto Clause results in an "absolute" veto that frustrates the will of the representative Branch was answered in *The Pocket Veto Case*. The Court explained that "[t]his argument involves a misconception of the reciprocal rights and duties of the President and of Congress," because the President must have the full ten days within which to consider the bill. 279 U.S. at 676-677. Accordingly, the Court stressed "that when the adjournment of Congress prevents the return of a bill within the allotted time, the failure of the bill to become a law cannot properly be ascribed to the disapproval of the President—who presumably would have returned it before the adjournment if there had been sufficient time in which to complete his consideration and take such action—but is attributable solely to the action of Congress in adjourning before the time allowed the President for returning the bill" (*id.* at 678-679). The Court added that "if Congress so desires the same bill may be re-introduced and passed when Congress resumes its session, and after receiving the due consideration of the President, if returned with his objections, may be then passed by the requisite vote in both Houses." *Id.* at 679 n.6. The option of repassing an identical bill of course remains available to Congress today and, unlike the vote to override a veto, requires only a simple majority of each House. Congress also has the option of postponing the presentment of the bill to the President for a sufficient time (perhaps only several days in the event of a brief intrasession recess) to assure that Congress will be in session should the President be disposed to disapprove and return the bill.[13]

[13] Moreover, respondents' suggestion of an alleged frustration of the democratic process is misplaced, because " '[t]he President is a representative of the people just as the members of the Senate and of the House are, and it may be, at some times, on some subjects, that the President elected by all the people is rather more representative of them' " (*Chadha*, 462 U.S. at 948, quoting *Myers* v. *United States*, 272 U.S. 52, 123 (1926)).

5. Contrary to respondents' remaining contention, nothing in *Wright* v. *United States*, 302 U.S. 583 (1938), undermines the controlling force of *The Pocket Veto Case*. As we have explained in our opening brief (at 41-45), *Wright* dealt with an entirely different situation—the actual return of a bill during a brief, three-day recess of only one House during a session of Congress. Such recesses may be taken unilaterally by either House for up to three days, without the need for the concurrence of the other House that is required for adjournments that the Constitution deems to be substantial interruptions in the legislative process. Art. I, § 5, Cl. 4. The Court held that the return of a bill during such a one-House recess was effective, even though delivery was made in the first instance to the Secretary of the Senate, who then delivered it to the Senate itself at the conclusion of the three-day recess. The Court in *Wright* carefully stated its holding at the conclusion of its opinion (302 U.S. at 598):

> We hold that where the Congress has not adjourned and the House in which the bill originated is in recess for not more than three days under the constitutional permission [in Art. I, § 5, Cl. 4] while Congress is in session, the bill does not become a law if the President has delivered the bill with his objections to the appropriate officer of that House within the prescribed ten days and the Congress does not pass the bill over his objections by the requisite votes.

Nothing in this limited ruling undermines the unanimous holding only nine years earlier in *The Pocket Veto Case*. And in fact the Court expressly reaffirmed both the specific holding in *The Pocket Veto Case* and its explanation of the operation and purposes of the Pocket Veto Clause where, as here, there has been an actual adjournment by "the Congress," rather than merely a three-day recess by only one House, as in *Wright*. 302 U.S. at 593-596. In particular, the Court reiterated that the purpose of the Clause is to prevent a bill from falling into a state of "suspended animation" and to enable the originating House to reconsider the bill promptly. *Id.* at 594-595. In reaching that conclusion, the Court carefully distinguished between "an ad-

journment by the Congress" (*id.* at 589) and a "recess"—repeatedly finding an explicit constitutional demarcation in the requirements of Art. I, § 5, Cl. 4, the Three-Day Adjournment Clause (302 U.S. at 589, 590, 591, 592, 595, 596, 598)—and recognized that the former constitutes the kind of substantial interruption of the lawmaking process to which the Pocket Veto Clause is addressed. *Wright* therefore obviously furnishes no support for respondents' argument that the Pocket Veto Clause was inapplicable following the adjournment sine die in this case, after which Congress did not reconvene for more than nine weeks.

For the foregoing reasons and the additional reasons stated in our opening brief, the judgment of the court of appeals should be vacated and the case remanded with instructions to dismiss because the case is moot and because respondents do not in any event have standing to bring this action. If the Court reaches the merits, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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